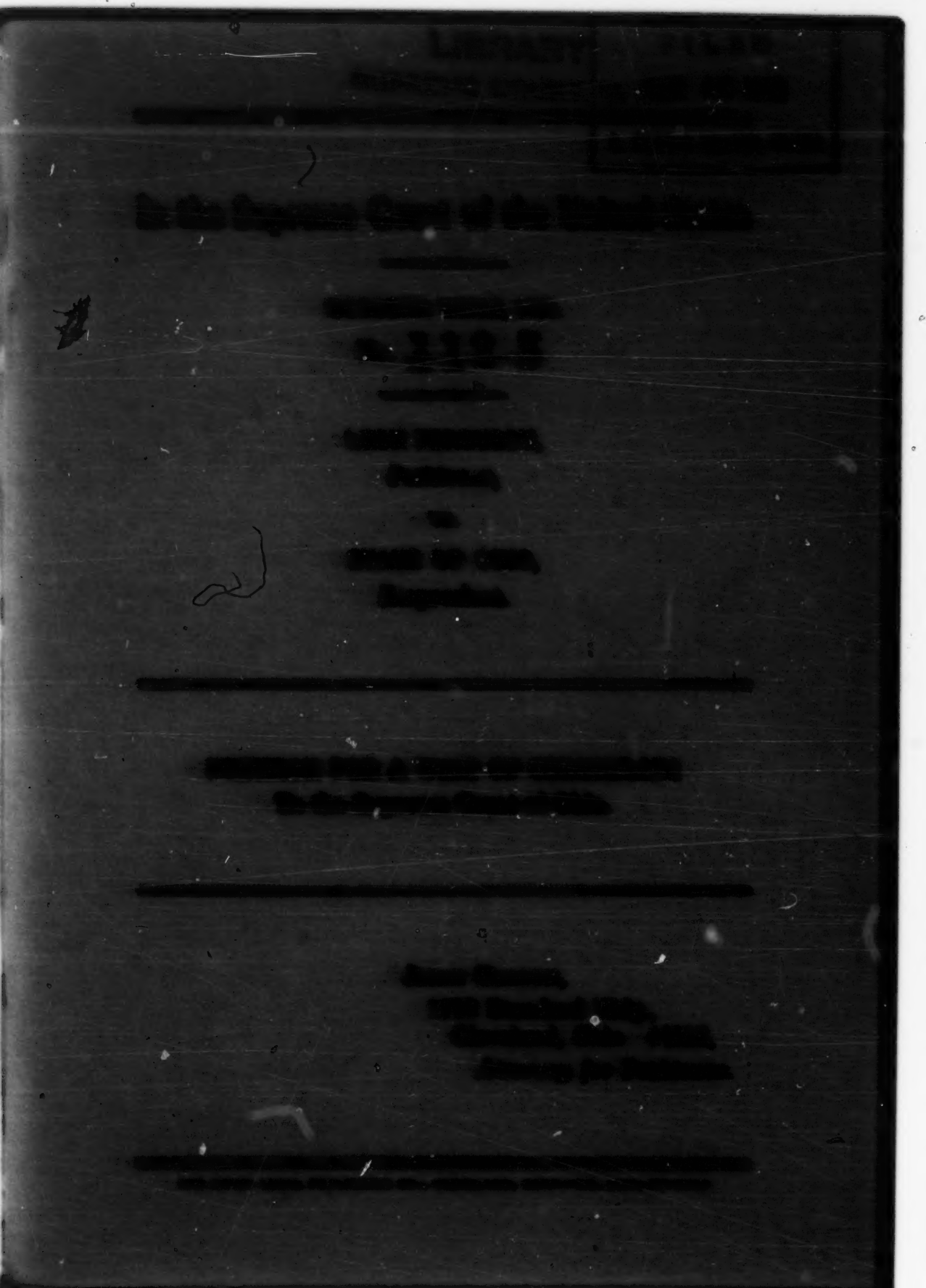

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In the Supreme Court of the United States

OCTOBER TERM, 1970.

No.

LEON FERGUSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

PETITION FOR A WRIT OF CERTIORARI To the Supreme Court of Ohio.

The petitioner, Leon Ferguson, asks that a Writ of Certiorari issue to review the judgment of the Supreme Court of Ohio, made and entered on September 24, 1970 (App. pp. 20, 21) denying petitioner's motions for appeal of right and for leave to appeal. The consequence of the denial of these motions was the affirmance of the judgment of the Ohio Court of Appeals affirming the dismissal by the Court of Common Pleas of Richland County, Ohio, of petitioner's petition for post-conviction relief.

OPINIONS IN THE COURTS BELOW.

The Supreme Court of Ohio did not write an opinion in this case. Its final orders are found in Appendix pp. 20-21. The per curiam memorandum opinion of the Court of Appeals for the Fifth Appellate District of Ohio is unreported but is reproduced in Appendix p. 18. The journal entry for the Court of Appeals is contained in Appendix p. 19. The Court of Common Pleas of Rich-

land County issued no opinion but the journal entry containing its findings of fact and conclusions of law is set out in Appendix pp. 15-17.

JURISDICTION.

The final judgment of the Supreme Court of Ohio was entered on September 24, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3). Petitioner claims his conviction was acquired in violation of rights, privileges and immunities secured by the Constitution of the United States.

QUESTION PRESENTED.

Whether petitioner was denied the Due Process of Law guaranteed by the Fourteenth Amendment when he was convicted of manslaughter and sent to prison for a period of up to 20 years without a trial and on the basis of a record which reveals the following:

1. Petitioner at no time waived any constitutional rights.
2. Petitioner at no time entered a guilty plea nor acknowledged that the guilty plea entered by his lawyer was entered on his behalf.
3. Petitioner was never advised by the trial court of his constitutional rights.
4. Petitioner was never apprised by the trial court of the possible consequences of a guilty plea.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED.

United States Constitution.

Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

Amendment XIV (quoted in pertinent part):

* * * No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Statutes.

Section 2901.06, Ohio Revised Code:

No person shall unlawfully kill another. Whoever violates this section, except in the manner described in sections 2901.01 to 2901.05, inclusive, of the Revised Code, is guilty of manslaughter in the first degree, and shall be imprisoned not less than one nor more than twenty years.

Section 2953.21, Ohio Revised Code:

(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial

or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a verified petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as will support his claim for relief.

(B) The clerk of the court in which the petition is filed shall docket the petition and bring it promptly to the attention of such court. A copy of the petition need not be served by the petitioner on the prosecution attorney. The clerk of the court in which the petition is filed shall immediately forward a copy of the petition to the prosecuting attorney of that county.

(C) Before granting a hearing the court shall determine whether there are substantive grounds for relief. In making such a determination, the court shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including but not limited to the indictment, the court's journal entries, the journalized records of the clerk of court, and the court reporter's transcript. Such court reporter's transcript if ordered and certified by the court shall be taxed as court costs. If the court dismisses the petition it shall make and file findings of fact and conclusions of law with respect to such dismissal.

(D) Within ten days after the docketing of the petition, or within such further time as the court may fix for good cause shown, the prosecuting attorney shall respond by demurrer, answer, or motion. Within twenty days from the date the issues are made up either party may

move for summary judgment as provided in section 2311.041 [2311.04.1] of the Revised Code. A bill of exceptions is not necessary in seeking summary judgment. The right to such judgment must appear on the face of the record.

(E) Unless the petition and the files and records of the case show the petitioner is not entitled to relief, the court shall proceed to a prompt hearing on the issues, hold the hearing, and make and file written findings of fact and conclusions of law upon entering judgment thereon.

(F) At any time before the demurrer, answer, or motion is filed, the petitioner may amend his petition with or without leave or prejudice to the proceedings. The petitioner may amend his petition with leave of court at any time thereafter.

(G) If the court finds grounds for granting relief, it shall, by its judgment, vacate and set aside the judgment, and shall, in the case of a prisoner in custody, discharge or resentence him or grant a new trial as may appear appropriate. The court may also make supplementary orders to the relief granted, concerning such matters as rearraignment, retrial, custody, and bail.

(H) Upon the filing of a petition pursuant to this section by a prisoner in a penal institution who has received the death penalty the court may stay execution of the judgment challenged by the petition.

STATEMENT OF THE CASE.

Petitioner was charged with murder in the second degree in the Court of Common Pleas of Richland County, Ohio. He appeared for arraignment on February 10, 1964, and entered a plea of not guilty. Subsequently an additional plea of not guilty by reason of insanity was filed in writing and petitioner was sent to Lima State Hospital for psychiatric tests. An order by the Court of Common Pleas dated May 8, 1964, states that the report from the psychiatrist was received and that petitioner would be considered sane.

On May 22, 1964, petitioner again appeared in the Court of Common Pleas and was found guilty of manslaughter on the basis of a plea entered allegedly on his behalf by his attorney. The record reveals that at this May 22 arraignment:

(a) The Court had no communication with petitioner personally until after the guilty plea was accepted.

(b) The Court at no time advised petitioner of his constitutional rights.

(c) The Court at no time apprised petitioner of the possible consequences of a plea of guilty.

(d) The Court at no time asked petitioner whether he was guilty of manslaughter or of any other offense.

(e) The Court at no time received a guilty plea from petitioner personally.

The only statement by petitioner on the record occurred *after* the Court accepted the guilty plea offered by petitioner's attorney. The pertinent part of the May 22 proceedings is as follows:

The Court: Well, we have here a charge of second degree murder, I believe. Are we ready for arraignment?

Mr. Larson: [prosecutor for Richland County] Yes, your Honor.

The Court: All right.

Mr. Larson: At this time, your Honor, I would like to state that the—

The Court: I guess he did plead not guilty and not guilty by reason of insanity?

Mr. Stokes: [Defense Counsel] Yes, your Honor.

The Court: That leaves us back with a plea of not guilty, I should say. Is there anything additional to come before the Court?

Mr. Larson: I have had indications, your Honor, from conferences with defense counsel, that the defense would like to enter a motion at this time with respect to the existing plea and to a further plea.

The Court: Very well, I will hear from counsel.

Mr. Stokes: May it please your Honor, the defendant at this time moves this Court for the right to withdraw the previous plea of not guilty and the previous plea of not guilty by reason of insanity, and if the Court should grant the same, this defendant would be willing at this time to enter a plea of guilty to the lesser included offense of manslaughter in the first degree.

The Court: Mr. Prosecutor, do you join in that motion?

Mr. Larson: Having heard the motion, I approve of the motion on behalf of the State of Ohio and join in the motion, and the State would be willing to accept a plea of guilty to the lesser included offense of second degree murder.

The Court: Do you likewise move for the record if it is necessary that we now consider the indictment amended to now stand as manslaughter?

Mr. Stokes: Yes, your Honor.

Mr. Larson: Yes, I approve.

The Court: All right, in that event I sustain the motion.

Of course at an earlier time we went over all the constitutional waivers, *I believe*, and we are now ready to tell this young man that I accept his plea of guilty to manslaughter, then I ask him—he is now confined to the institution, as I understand?

Mr. Stokes: Yes, your Honor.

The Court: I ask him: Do you have anything to say as to why judgment should not be pronounced?

Mr. Stokes: Stand up.

Mr. Ferguson: I can't think of anything to say why sentence should not be pronounced against me.

The Court: Thank you. Where is he now? Reformatory?

Mr. Larson: That's correct.

The Court: We will make it one to twenty in the Ohio State Pen.

Any objection from counsel as to the procedure this morning?

Mr. Stokes: None, your Honor.

The Court: So ordered. (Emphasis added)

Petitioner has been incarcerated in the Ohio State Penitentiary since shortly after May 22, 1964. On June 30, 1969, he filed a petition for post-conviction relief under section 2953.21, Ohio Revised Code. The third paragraph of the petition states in part:

> Defendant says that he was convicted and sentenced to the Ohio State Penitentiary in violation of his right to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution.

A certified copy of the complete transcript of the May 22 arraignment was attached to the petition.[1] The Court de-

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[1] The Court of Common Pleas in its journal entry of October 31, 1969, refers to it as a "partial transcript" since it did not contain the proceedings of the arraignment of February 10, 1964, at which defendant entered a plea of not guilty.

nied relief and in its journal entry of October 31, 1969, Appendix at p. 16, stated "that the constitutional issues had been explained to defendant at the initial arraignment upon Indictment." The court was in error.[2] The record of the earlier arraignment discloses the following:

> The Court: We're here this afternoon on the case of the State of Ohio versus Leon Ferguson. The charge is murder in the second degree.
>
> Does defense counsel have anything to say on behalf of his client? Shall I run through the constitutional guaranties, or do you want to cover that in your statement?
>
> Mr. Stokes: May it please your Honor, Mr. Norman S. Minor, an attorney practicing in Cleveland, Ohio, represents this defendant. Mr. Minor is presently engaged in a first degree matter in the city of Cleveland, and he has asked me as his law partner to appear before your Honor and to enter a plea of not guilty on behalf of this defendant.
>
> We would waive a reading of the charges, and we would waive this Court advising the defendant of his constitutional rights in that we will undertake this on behalf of our client.

At the May 22 arraignment, as indicated above, the only reference to advising petitioner of his constitutional rights was the Court's statement, "Of course at an earlier time we went over all the constitutional waivers, I believe * * *" In spite of this tentative statement, in spite of the fact that

---

[2] Section 2953.21(c) of the Ohio Revised Code charges the trial judge in considering a petition for post-conviction relief to examine "all the files and records" of the case and to order from the court reporter any pertinent transcripts. While the Common Pleas judge was categoric in insisting that the defendant's constitutional rights had been explained to him at the first arraignment, the Court did not order the proceedings transcribed. Defendant contended that the initial arraignment was totally irrelevant since a plea of not guilty was entered then and no constitutional rights were waived. Nevertheless defendant had the transcript produced and made part of the bill of exceptions.

at the "earlier time" petitioner had plead *not guilty*, and in spite of the fact that there is no evidence in the record that petitioner's constitutional rights were ever explained to him, the Court of Appeals of Richland County affirmed the holding below on March 18, 1970. On September 24, 1970, the Ohio Supreme Court dismissed petitioner's appeal without opinion on the ground "that no substantial constitutional question exists herein." Appendix p. 20.

Both in the Ohio Court of Appeals and in the Ohio Supreme Court, petitioner's claim that he was denied federal constitutional rights was clearly asserted. In his brief to the Court of Appeals, petitioner contended:

> A. Defendant's plea of guilty to manslaughter was and is void because the court failed to advise defendant of his constitutional rights. Defendant was thereby denied due process of law contrary to the guarantees of the Fourteenth Amendment of the United States Constitution.
>
> B. Defendant's plea of guilty to manslaughter was and is void because the court failed to apprise defendant of the possible consequences of his plea. Defendant was thereby denied due process of law contrary to the guarantees of the Fourteenth Amendment of the United States Constitution.

In the memorandum invoking the jurisdiction of the Ohio Supreme Court under the heading "Substantial Constitutional Questions Are Involved," petitioner argued:

> The rights written into the Sixth Amendment of the United States Constitution and incorporated into the Fourteenth Amendment by virtue of its Due Process Clause have no meaning if they may be blithely waived without a positive showing on the record that the defendant acted knowingly, intelligently and voluntarily.

REASONS FOR GRANTING THE WRIT.

I. The Holdings Below Run Counter to This Court's Rule That Any Waiver of Fundamental Constitutional Right Must Be Shown on the Record.

Petitioner's verified petition for post-conviction relief states "that on May 22, 1964, a plea of guilty of manslaughter in the first degree was entered for him by his attorney without his understanding or agreement." *Nothing in the record of this case contravenes that statement.* Yet the Ohio courts have rejected the due process violations claimed here and they have done so in a manner contrary to the holdings of this Court. Completely disregarding the injunction in *Johnson v. Zerbst*, 304 U.S. 458 (1938), which forbids relying on a silent record to support the waiver of constitutional rights, the Ohio courts *guessed* and *speculated* that petitioner acted knowingly, intelligently and voluntarily at his second arraignment when his attorney entered a guilty plea allegedly in his behalf. Guesswork and speculation, however, are not sufficient to send a man to jail for a period of up to 20 years:

> Out of just consideration for persons accused of crime, courts are careful that a plea of guilty shall not be accepted unless made voluntarily after proper advice and with full understanding of the consequences. *Kercheval v. United States*, 274 U.S. 220, 223 (1927).

II. The Case Affords the Court an Opportunity to Clarify Whether a pre-Boykin Guilty Plea May Stand in the Absence of a Record Showing the Plea Was Voluntarily, Knowingly and Intelligently Entered.

It is undisputed that the proceedings below are invalid under *Boykin v. Alabama*, 395 U.S. 238 (1969). It has been held that the doctrine enunciated in *Boykin* does not apply retrospectively, see *United States ex rel. Hughes v. Rundle*, 419 F.2d 116 (3d Cir. 1969). Even if this Court should agree with such a view, "the mere fact that petitioner was convicted before the effective date of *Boykin* (June 2, 1969) does not deprive him of the right to a hearing on his claim that his guilty plea was constitutionally infirm." *United States ex rel. Fear v. Commonwealth of Pa.*, 423 F.2d 55, 56 (3d Cir., 1970). The burden of proof to sustain a guilty plea in the absence of a record showing the plea was voluntarily, knowingly and intelligently made, is on the prosecution. *United States ex rel. Fink v. Rundle*, 414 F.2d 542 (3d Cir. 1969); *United States ex rel. Crosby v. Brierley*, 404 F.2d 790 (3d Cir. 1968); *United States ex rel. McCloud v. Rundle*, 402 F.2d 853 (3d Cir. 1968). The prosecution assumed no such burden here relying solely on a record which petitioner submits is inadequate even under pre-Boykin standards. By allowing certiorari, this Court could determine what those standards are and the extent to which a pre-Boykin defendant is protected by the Due Process Clause of the Fourteenth Amendment.

It is important to note that well before the *Boykin* decision, state courts held that a judge must advise a defendant of his constitutional rights; must advise him of the possible consequences of a guilty plea; must communicate with him personally; and must assure that the plea of guilty is entered knowingly, intelligently and

voluntarily. See *Knauf v. Kolouki*, 4 Ohio St. 2d 86, 88, 212 N.E.2d 603, 604 (1965); *State v. Ellsworth*, 415 P.2d 728 (Mont. Sup. Ct. 1966); *People v. Mackey*, 33 Ill. 2d 436, 211 N.E.2d 706 (1965); and *People v. Johnson*, 2 Mich. App. 182, 139 N.W.2d 137 (1966). These decisions speak of "fundamental rights" and "constitutional standards"; they clearly involve the protection of federal rights rooted in the Sixth and Fourteenth Amendments. As stated in 1964, the year of petitioner's conviction, in 97 A.L.R. 2d 549, 552:

> The fundamental right of an accused to be informed of the nature of the crime with which he is charged has usually been regarded as including the right to be informed of the consequences of a conviction thereof, and accordingly the courts appear to be in agreement that even in the absence of a statute or court rule directly imposing a duty to advise or admonish the accused as to the consequences of a plea of guilty, *the court is required to determine, before receiving a plea of guilty, that the accused does understand the consequences of making such a plea*, and to inform him of such consequences if he is not already advised thereof. (Emphasis added.)

Presence of counsel does not obviate the necessity of the Court's communicating with the accused:

> [E]ven though the accused is represented by counsel, the court must ascertain that he fully understands the consequences of his plea of guilty sufficiently to make that plea understandingly. *Id.* at 571.

The plea of guilty cannot be entered by an attorney alone but must be entered by the defendant personally. *Alexander v. State*, 226 S. 2d 905 (Misc. Sup. Ct. 1969).

CONCLUSION.

The question of waiver of fundamental rights has for several decades been regarded as one involving substantial constitutional questions. Since the facts of the subject case are particularly clear and since the failure of the trial court to observe the most minimal constitutional safeguards in accepting a guilty plea is so patent, the Court is urged to allow certiorari, to fortify its holdings on waiver, and to vindicate petitioner's right to Due Process.

Respectfully submitted,

JERRY GORDON,
Counsel for Petitioner.

APPENDIX.

DECISION OF THE COURT OF COMMON PLEAS.

Case No. 6604

IN THE COMMON PLEAS COURT OF
RICHLAND COUNTY, OHIO

STATE OF OHIO,

Plaintiff,

vs.

LEON FERGUSON,

Defendant.

JOURNAL ENTRY, FINDINGS OF FACT AND CONCLUSIONS OF LAW.

(October 31, 1969.)

The petition of Leon Ferguson to vacate judgment and sentence pursuant to Section 2953.21 of the Ohio Revised Code, upon motion of the State filed in accord with said section and upon examination of the petition, files and records of said case, and in consideration of arguments by counsel that petitioner is not entitled to relief. The finding of this Court is based upon the following, to-wit: The Court finds the facts to be that Leon Ferguson was Indicted by the January Term of the Grand Jury in 1964 on a charge of Murder in the Second Degree; that on February 10, 1964, the defendant was arraigned on said Indictment, represented by Attorney Louis Stokes, at which time defendant stated he understood the Indictment; that on March 9, 1964, by order of this Court, the defendant was referred to Lima State Hospital, Lima, Ohio for examination in accordance with Section 2945.40 of the Ohio Revised Code; that on May 22, 1964, defend-

ant, represented by his attorney, appeared in this Court, upon his return from the Lima State Hospital, Lima, Ohio, and upon said hearing there being no evidence presented or tendered to the Court, other than the report of said state facility, said report was admitted as prima facie evidence as to the findings stated therein, to-wit: that the defendant understands the nature of the charges brought against him and can counsel in his own defense, and he would therefore be considered sane; upon consideration thereof the Court found the defendant to be sane; that the defendant moved the Court for leave to withdraw his former plea of Not Guilty and Not Guilty by reason of insanity, and to enter a plea of Guilty to Manslaughter in the First Degree and the Prosecuting Attorney having approved and joined in said motion, the Court thereupon took said motion under consideration, and upon consideration of said motion, it is ordered that the Indictment be amended to a charge of Manslaughter in the First Degree, whereupon, defendant's plea of Guilty to said amended Indictment is accepted; and the Court inquired of the defendant and his attorney, if he or they had anything to say why sentence should not now be pronounced, and the defendant and his attorney had nothing further to say. That the partial transcript of proceedings which was made a part of defendant's petition demonstrates that it was not the initial arraignment upon Indictment but a subsequent arraignment after return from Lima State Hospital and said partial transcript indicates, on Page 5, that the constitutional issues had been explained to defendant at the initial arraignment upon Indictment.

The Court finds, as a conclusion of law, that it has discretion as to whether or not a petition for relief should be granted under authority of Section 2953.21, of the Ohio Revised Code.

The Court further finds, as conclusions of law, that defendant was properly Indicted by Grand Jury; that the defendant was properly arraigned on the said Grand Jury Indictment; that defendant was appraised of his constitutional rights at said arraignment; that the defendant was represented by an attorney of his choice, Louis Stokes, at said arraignment; that after defendant's return from the Lima State Hospital, Lima, Ohio it was judicially determined that the defendant understood the nature of the charge against him and could counsel in his own defense; that the defendant moved the Court to amend the Indictment to a charge of Manslaughter in the First Degree while represented by an attorney of his choice, Louis Stokes.

Accordingly, IT IS ORDERED, ADJUDGED AND DECREED that the petition, files, records and upon argument of counsel the petitioner is not entitled to relief, wherefore, said petition is denied and ordered dismissed.

/s/ JAMES J. MAYER,
Judge.

OPINION OF THE COURT OF APPEALS.

Case No. 1116

COURT OF APPEALS, FIFTH DISTRICT
RICHLAND COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

vs.

LEON FERGUSON,

Defendant-Appellant.

By the Court:

The judgment of the Richland County Common Pleas Court of October 31, 1969, denying post conviction relief to the defendant-appellant is affirmed, and the only Assignment of Error alleging "the trial court erred in failing to grant defendant post conviction relief" is upon careful consideration of the entire record and the briefs and oral arguments of counsel, overruled.

An entry may be prepared in accordance with this memorandum.

Norman J. Putman,
Leland Rutherford,
D. Van Nostran,
Judges.

ORDER OF THE COURT OF APPEALS.

Case No. 1116

COURT OF APPEALS, FIFTH DISTRICT
RICHLAND COUNTY, OHIO

STATE OF OHIO,

Plaintiff-Appellee,

VS.

LEON FERGUSON,

Defendant-Appellant.

JOURNAL ENTRY.

(Filed March 18, 1970.)

This matter coming before this Court as regularly assigned upon the notice of appeal, assignment of error, the records, briefs and oral arguments of counsel and upon consideration thereof the assignment of error of Defendant-Appellant is overruled and the judgment of the Richland County Common Pleas Court of October 31, 1969 denying post conviction relief to the Defendant-Appellant is affirmed.

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the judgment hereinbefore described be and the same hereby is affirmed.

Exceptions to Defendant-Appellant. Costs herein taxed to Defendant-Appellant.

NORMAN J. PUTMAN,
PAUL D. VAN NOSTRAN,
LELAND RUTHERFORD,
Judges.

ORDERS OF THE SUPREME COURT OF OHIO.

No. 70-208.

THE SUPREME COURT OF THE STATE OF OHIO

THE STATE OF OHIO,
CITY OF COLUMBUS.

1970 TERM.
To wit: September 24, 1970.

STATE OF OHIO,

Appellee,

VS.

LEON FERGUSON,

Appellant.

APPEAL FROM THE COURT OF APPEALS
FOR RICHLAND COUNTY.

This cause, here on appeal as of right from the Court of Appeals for Richland County, was heard in the manner prescribed by law, and, no motion to dismiss such appeal having been filed, the Court sua sponte dismisses the appeal for the reason that no substantial constitutional question exists herein.

It is further ordered that the appellee recover from the appellant its costs herein expended; that a mandate be sent to the Common Pleas Court to carry this judgment into execution; and that a copy of this entry be certified to the Clerk of the Court of Appeals for Richland County for entry.

THE SUPREME COURT OF THE STATE OF OHIO

* * * * *

(Caption as above)

MANDATE

To the Honorable Common Pleas Court

Within and for the County of Richland, Ohio, Greeting:

The Supreme Court of Ohio commands you to proceed without delay to carry the following judgment in this cause into execution:

Dismissed, Sua Sponte, No Substantial Constitutional Question Involved.

THE SUPREME COURT OF THE STATE OF OHIO

* * * * *

(Caption as above.)

MOTION FOR LEAVE TO APPEAL FROM THE COURT OF APPEALS FOR RICHLAND COUNTY.

It is ordered by the Court that this motion is overruled.

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E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970.

No. 1125.

LEON FERGUSON,
Petitioner,

vs.

STATE OF OHIO,
Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI.

JERRY GORDON,
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In the Supreme Court of the United States

OCTOBER TERM, 1970.
No. 1125.

LEON FERGUSON,
Petitioner,
vs.
STATE OF OHIO,
Respondent.

SUPPLEMENTAL BRIEF TO THE PETITION FOR A WRIT OF CERTIORARI.

This Supplemental Brief is being filed pursuant to Rule 24 (5) of this Court's rules. It is being filed to correct a serious misrepresentation of facts contained in Respondent's Brief in Opposition.

Respondent's central argument is that new evidence was introduced for the first time on appeal and that the petition for certiorari should be denied for that reason. *There was no new evidence introduced on appeal.* By the express provisions of Section 2953.21 (C), Ohio Revised Code, quoted verbatim on page 4 of the Petition for Certiorari, all records, journal entries and court reporter's transcripts are before the trial court in a post-conviction relief proceeding. Further, the statute imposes upon trial courts a *duty* to order court reporter's transcripts if relevant to its determination of a petition for post-conviction relief. *It must be emphasized that the trial judge hearing the petition for post-conviction relief in the subject case was the same judge who accepted the guilty plea allegedly*

made on petitioner's behalf.[1] In claiming that the proceedings previously concluded by the trial judge were not before him in the petition for post-conviction relief, respondent not only overlooks the fact that the trial judge was bound to take notice judicially of these proceedings but also misleads this Court with respect to Section 2953.21 (c) of the Ohio Revised Code. The fact that the trial court in this case precipitously rendered its judgment without ordering or checking a transcript of earlier proceedings, if it thought such transcript was material, changes nothing.

Petitioner attached to his petition for post-conviction relief the *complete* transcript of the hearing at which *for the first time* he entered a guilty plea. Petitioner contends that that transcript is the only one necessary to determine the issues posited here. It is undisputed that at no time during the May 22 hearing did the trial court make any effort to explain to petitioner his constitutional rights, to ascertain whether the plea of guilty was entered voluntarily, knowingly and intelligently, or to apprise him of the possible consequences of a guilty plea. Nor was such advice or admonition given *at any previous hearing*. The burden of establishing the validity of a guilty plea is on the State, *Crosby v. Brierley*, 404 F.2d 790, 796 (3rd C.A. 1968).

Respondent apparently would like this Court to confine its consideration to the May 22, 1964, transcript at which time the trial court said, "Of course at an earlier time we went over all the constitutional waivers, *I be-*

---

[1] In Ohio, as elsewhere, it is well established that a trial court takes judicial notice of its own proceedings in the immediate case under consideration. *Meyers v. State*, 46 Ohio St. 473, 22 N.E. 43 (1889). Pursuant to Ohio practice the petition for post-conviction relief was filed under the same case number assigned at the time of the indictment.

*lieve * * *.*" (emphasis added); and then to conclude that the constitutional waivers were in fact explained, *even though the record belies it!*

CONCLUSION.

There is not a scrap of evidence anywhere in the record of this case which shows that petitioner knew what he was doing when the guilty plea was entered. Petitioner at no time entered such a plea. The presence of an attorney, by itself, has been deemed insufficient for a showing of compliance with Due Process imperatives at the time a guilty plea is entered. See *Brookhart v. Janis*, 384 U.S. 1, 8 (1966); *Crosby v. Brierley, supra; Codarre v. Gilligan*, 363 F.2d 961 (2 Cir. 1966); *State v. Sisco*, 169 N.W.2d 542, 548 (Iowa Sup. Ct. 1969)[2]; *Alexander v. State*, 226 S.2d 905 (Miss. Sup. Ct. 1969). Guesswork and supposition will not suffice either. Petitioner should be permitted to re-plead with the State of Ohio reserving the right to try him if the plea is not guilty. In any event this case presents serious Sixth and Fourteenth Amendment constitutional issues which warrant this Court's attention. For that reason the petition for certiorari should be granted.

Respectfully submitted,

JERRY GORDON,
Counsel for Petitioner.

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[2] The Court said, "[A] sentencing court may not abrogate or delegate to anyone, *including attorney for accused*, the duty to determine defendant's knowledge of the charge, appreciation of legal consequences of a guilty plea, whether it is voluntarily entered, or existence of facts supporting it." (Emphasis added.)

SUPREME COURT, U. S.

FILED

FEB 8 1971

E. ROBERT SEAVER, CLER

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 1125

LEON FERGUSON,

Petitioner,

vs.

STATE OF OHIO,

Respondent.

On Petition for a Writ of Certiorari
To The Supreme Court of Ohio

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions below are unreported but are contained in the petition of petitioner .

JURISDICTION

The purported jurisdictional requisites as set forth in the petition are not applicable, and there is no basis for jurisdiction in this court.

QUESTIONS PRESENTED

Whether petitioner after being represented by able counsel of his own choosing after plea bargaining and having a charge of murder in the second degree reduced to manslaughter to which he was able to plead Guilty,

may state that he was denied due process in that he was unaware of his consitutional rights after petition for Post Conviction Relief in which the only evidence presented was that there were adequate constitutional waivers and may introduce additional evidence in the appellate courts to attempt to reverse a finding that the plea was voluntarily entered and to seek a retroactive application of *Boykin v. Alabama*, 395 U.S. 238.

STATEMENT OF THE CASE

Defendant-Appellant, herein referred to as defendant, was charged with murder in the second degree in the Court of Common Pleas of Richland County. He appeared for arraignment on February 10, 1964, with Attorney (now Congressman) Louis Stokes, who he had personally selected and hired and entered a plea of Not Guilty. Subsequently an additional plea of Not Guilty by reason of insanity was filed in writing by defendant's counsel and the defendant was conveyed to Lima State Hospital for psychiatric examination. An order by the Court of Common Pleas dated May 8, 1964, states that the report from Lima was received and that the defendant would be considered sane.

On May 22, 1964, defendant again appeared in the Court of Common Pleas with his counsel at which time the prosecutor indicated to the court that through conference with defense counsel, defendant wished to plead further and defendant by his counsel moved the court to withdraw his plea of Not Guilty and Not Guilty by reason of insanity and that he be allowed to plead Guilty to a lesser included offense of manslaughter. The court then amended the indictment and sustained defendant's motion for leave to plead Guilty. The court further inquired of the defendant if he had anything to say why sentence should not be pronounced against him and defendant stated, "I can't think of anything to say why

sentence should not be pronounced against me." The court sentenced defendant to one (1) to twenty (20) years in the Ohio State Penitentiary. No direct appeal was ever taken from this decision of the Court of Common Pleas. Defendant has been incarcerated in the Ohio State Penitentiary since shortly after May 22, 1964.

On June 30, 1969, defendant filed his petition for Post Conviction Relief alleging that the Guilty plea was void because secured in violation of rights guaranteed by Due Process Clause of the Fourteenth Amendment. A certified copy of the complete transcript of the May 22 arraignment was attached to the petition. This transcript indicated the court had earlier gone over constitutional waivers. Defendant, represented by present counsel, did not offer in evidence any prior transcripts and did not present any evidence that he was not fully advised by the court or his counsel, or that the transcript was in error.

The Court of Common Pleas denied relief and in its journal entry of October 31, 1969, stated that "the constitutional issues had been explained to defendant at the initial arraignment upon indictment." Defendant then appealed this finding to the Court of Appeals of Richland County, Fifth District. Defendant then for the first time attempted to enter transcripts which were not before the Common Pleas Court. On March 18, 1970, said Court of Appeals unanimously affirmed the holding of the Common Pleas Court. On September 24, 1970, The Supreme Court of Ohio found no substantial constitutional issue to exist and overruled the motion for leave to appeal.

ARGUMENT

Basically, the Common Pleas Court of Richland County, Ohio, in considering defendant's petition for Post Conviction Relief, had before it a relatively simple set of facts as initially presented. Defendant's own coun-

sel actively represented him at numerous trial proceedings, including a mental examination at Lima State Hospital, and actively plea bargained on his part. After such vigorous representation defendant's counsel, in open court with defendant present, moved to enter a plea to a lesser charge. The court accepted defendant's motion and if at any point court erred, it was led into such error by the active position of defendant and his counsel. Despite numerous court appearances defendant, by his present counsel in filing for relief, presented the transcript of only one of several hearings being the transcript of the final proceeding. The sole evidence before the trial court was that all constitutional issues had been explained and defendant was entering a voluntary plea to a lesser charge than what he had been indicted for. Only after the trial court entered its ruling denying the relief did defendant and his counsel seek to present additional evidence in the appellate courts indicating that all constitutional issues may not have been explained and that for that reason the plea might be defective. Even such additional evidence indicated that defendant's counsel had fully advised him of his rights, defendant at no time ever indicating that he might be innocent.

Even if this court would judge this issue on the basis of additional evidence which was not before the trial court when it denied Post Conviction Relief, the effect of petitioner's request is to seek to have *Boykin v. Alabama* applied retroactively. This court in *Halliday v. United States*, 394 U.S. 831, refused to apply *McCarthy v. United States*, 394 U.S. 459, retroactively. The same logic which was then applied is equally applicable in the present case. It is especially pertinent to note that the court stated it would consider the effect retroactive application would have upon the administration of jus-

tice. An examination of the State rulings clearly indicates that such a retroactive application would be staggering to the imagination to contemplate the chaotic effect of retrying thousands of cases in various states. In all of the following cases, the states have refused to apply the doctrine of *Boykin v. Alabama* retroactively: *Nachtigall v. Erickson*, 178 N.W. 2d 198 (South Dakota); *Endsley v. Capp*, 459 P. 2d 448, Ore. App.; *Ernst v. State*, 170 N.W. 2d 713, Wis.; *In re Tahl*, 460 P. 2d 449, Cal.; *State v. Griswold*, 457 P. 2d 331, Ariz.; *State v. Lindsey*, 171 N.W. 2d 859, Iowa; *State v. Urbano*, 457 P. 2d 343, Ariz.

CONCLUSION

It is apparent that, based upon the evidence before the trial court at the time the Post Conviction Relief was considered, defendant was fairly represented and fairly and voluntarily entered his plea. It is further apparent that if additional evidence is considered and all technical requirements were not explained to the satisfaction of the test in *Boykin v. Alabama*, that a retroactive application of such requirements would be devastating to every State.

Respectfully submitted,

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